U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 30May2002

CASE NO.: 2001-LHC-1150

OWCP NO.: 03-27747

In the Matter of:

JAMES R. MARANEY
Claimant

v.

CONSOLIDATION COAL COMPANY
Employer

APPEARANCES:

Stephen Moschetta, Esquire
For the Claimant

Michael Zimecki, Esquire
For the Respondent

BEFORE: ROBERT J. LESNICK
Administrative Law Judge

DECISION AND ORDER DISMISSING CLAIM FOR LACK OF JURISDICTION

The above-captioned claim arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.*, (hereinafter "The Act"or "LHWCA"), The claim is brought by James R. Maraney (hereinafter "Claimant") against Consolidation Coal Company (hereinafter "Respondent").

PROCEDURAL HISTORY

Claimant filed his claim for benefits under the Act on September 28, 2000. (CX 1).[1] On January 24, 2001, the above-captioned claim was referred to the Office of Administrative Law Judges for a formal hearing. A Notice of Hearing was issued on April 5, 2001, setting the claim

[1] The following abbreviations have been used in this opinion: RX = Respondent's exhibits; CX = Claimant's exhibits; ALJX = Court exhibits; TR = Hearing Transcript.

for a formal hearing on August 8, 2001 in Pittsburgh, Pennsylvania. By motion, dated March 27, 2001, Respondent moved for a protective order and to bifurcate the jurisdictional issue in this claim. Claimant filed a timely response to Respondent's motion. Respondent's motion to bifurcate was granted by Order dated May 23, 2001.

Claimant then filed a Motion to Compel Discovery Responses on June 29, 2001. By Order dated July 10, 2001, Respondent was ordered to provide Claimant with certain photographs pertaining to the jurisdictional issue. Respondent then moved to exclude the affidavit and hearing testimony of Captain Jack Ross. This Court issued an Order, dated August 7, 2001, granting the motion to strike Captain Ross' affidavit, but denied the motion to exclude Captain Ross' testimony at the formal hearing.

A hearing was conducted in Pittsburgh, Pennsylvania on August 9 and 17, 2001 at which time all parties were afforded a full opportunity to present evidence and argument, as provided in the Act and the Regulations. During the hearing, Claimant's Exhibits 1 through 17, Respondent's Exhibits A through FF, and Administrative Law Judge's Exhibits 1 and 2 were received into evidence. The parties also submitted post-hearing briefs and reply briefs.[2] All of this evidence has been made part of the record.

ISSUE

The only issue to be determined at this time is whether Claimant comes within the jurisdictional purview of the Longshore and Harbor Workers' Compensation Act.

FINDINGS OF FACT

Background

Claimant was injured on November 10, 1999 at the Robena Preparation Plant (hereinafter "Robena"). Considering that the only issue before this Court is jurisdictional, no further discussion of Claimant's injury and subsequent treatment is necessary.

[2]Under cover letter dated October 24, 2001, Respondent submitted a Reply Brief. Claimant submitted a Reply Brief on that same date. On November 2, 2001, Claimant made a Motion to Strike certain attachments to Respondent's Reply Brief. Claimant's motion is granted and only the portions of Respondent's Reply Brief that are pertinent to the legal issue presented before this Court have been considered in rendering this decision.

Hearing Testimony

Claimant

Claimant testified at the time of the hearing in this matter that he was 59 years old and received a high school diploma before attending college for one year. (TR 94). Claimant then went to work for Continental Can Company and Westinghouse before becoming employed at the Robena location on April 5, 1965.[3] (TR 95-96). Claimant went on to elaborate on his work history at the Robena facility. Claimant worked in the underground mining operation until November 1969. (TR 96).

From 1969 through 1984, Claimant worked as a machinist first class. (TR 97). In this capacity, Claimant was responsible for running a lathe and milling machine. (TR 98). Claimant also worked on the gear boxes and repaired feeder belt motors and conveyor belts. (TR 98). Claimant stated that he would repair and install motors and gears all over Robena. (TR 99). Claimant went on to state that these repairs included working "at the tipple quite a bit, changing rollers, even splicing belts." (TR 100).

Claimant was laid off work in April 1982 and was subsequently called back to work at Robena in June or July of 1986. (TR 101). When Claimant initially returned to work at Robena, he was hired to work in the blending bin. (TR 102). From 1986 through 1990, Claimant would work overtime as a mechanic while working his regular duties for the job classification "preparation utility." (TR 101 & 103). While working as a mechanic, Claimant performed work on gear boxes, motors, and belts. (TR 103). In 1988, Claimant began working as a mobile equipment operator. (TR 104).

Claimant's work as a mobile equipment operator involved "mostly [doing] stockpile, but [the job entails] whatever needed done." (TR 104). Claimant also stated that his job would require him to "push slate" and "maintain the roads." (TR 104). Claimant explained that he "was always told the D-Stockpile was your main area to keep it, to keep the water running the way it was supposed to, runoff the way it was supposed to." (TR 104).

Claimant cited to a drawing of the facility that he had produced to show that his principal responsibility was to maintain the D-Stockpile and the stoker. (TR 104 illustrated with CX 6). Claimant also testified that he was responsible for keeping the roads surrounding the plant in good order so that the trucks used at Robena could maneuver without difficulty. (TR 105). Claimant

[3] Claimant stated that at the time he was hired at Robena, the mine was owned by U.S. Steel Corporation. In 1984, Respondent purchased the location and subsequently ceased its underground mining operations. Robena then was used only in the capacity that it was used at the time of Claimant's injury.

also illustrated his work at the D-Stock hopper with photographs and explained that he was responsible for maintaining the area around the D-Stock hopper. (TR 106-108, citing to CX 16).

Claimant testified that from 1990 to the time of his injury, he worked as a "mobile equipment operator/crane, dozer, clam." (TR 108). Claimant explained that this position involved essentially the same duties as the mobile equipment operator position. (TR 108-109). Claimant stated that he would work 12 hour days at this time. (TR 111). Claimant explained that his work day would begin by reporting to his supervisor to inquire as to whether "there was anything special he wanted done." (TR 111).

If the supervisor did not indicate any special need for that morning, Claimant would begin the task of clearing the roads around Robena. (TR 111). Claimant stated that the area he was charged with maintaining included "the stoker pile, around the D-Stock, ... around the tipple." (TR 113). Claimant indicated that he focused on the area between the stoker pile and the D-Stock hopper because of the significance of that area to the operation of Robena. (TR 113). As a part of his road clearing duties, Claimant testified that he would push coal into the D-Stock hopper. (TR 114).

Claimant stated that it was necessary to push coal into the D-Stock hopper to "get rid of the coal." (TR 114). Claimant went on to explain that once the coal was pushed through the D-Stock hopper, the coal "goes down onto 85 belt and up into the tipple." (TR 114). Claimant indicated that these activities were his primary function on working days. (TR 114). Claimant stated that the majority of the coal in the D-Stockpile was clean coal and that from 1994 to 1997, Claimant would spend his time "loading in the morning." (TR 115).

From 1990 to 1999, Claimant testified that he would repair and maintain the loader and the unloader. (TR 116). Claimant stated that his work on the unloader included putting "the chain links in, or if a pin would fall out of these big links ..." (TR 116). Claimant also stated that he would maintain the running lines on the unloader. (TR 118). Additionally, between the years of 1990 and 1995, Claimant testified that he assisted in the preparation of the running lines on two separate occasions. (TR 119). Claimant also stated that he has previously worked on the motor, reduction gear, and the unloader drive. (TR 120).

Claimant testified that between 1995 and 1997, he adjusted the pins on the unloader approximately three to four times per year, and he adjusted the brakes "about twice a week." (TR 120). However, after 1997, because of the retirement of Claimant's work partner, Claimant had less time to do any work other than bulldozing the D-Stockpile and working on Plant Pond #4

(hereinafter "Pond #4").[4] (TR 121). Claimant stated that between 1995 and 1999, he did not complete any repairs on any belts at the river tipple, but between 1990 and 1999, Claimant was at the river tipple for repairs "quite a bit." (TR 121).

Claimant further testified that he worked on the tipple belt between 1990 and 1999 to keep the belt in working order and cleaning any coal that spilled off the belt. (TR 122). Claimant then went on to explain that he was certified to operate the river tipple on June 5, 1997, and that he had been certified to operate the river tipple from 1994 until that date. (TR 125).

Claimant went on to explain that it is the job of the river tipple operator to load the coal onto the barges. (TR 127). Claimant then stated that he operated the river tipple "numerous times" between 1994 and 1997 in the morning hours of his shift. (TR 127). Claimant said that he operated the tipple before the plant operation was started for the day to "help out." (TR 127). Between the years of 1994 and 1997, Claimant testified that he would load the barges through the river tipple from 4:00 a.m. to 7:00 a.m. or 7:30 a.m. (TR 127).

Claimant went on to explain in detail how the coal would travel from the D-Stockpile to eventually arrive at the river tipple to be loaded into the barges. (TR 128). Claimant testified that he was asked to perform these duties by a person in the management of Robena. (TR 130). Claimant stated that a new computer system was installed at the river tipple in 1998. (TR 131).

Claimant testified that the computerized system made the operation of the river tipple, "[a]bout a thousand times easier to run." (TR 131). Claimant testified further that since the installation of the new computer system, he has operated the river tipple at the request of the operators, but not in any official capacity. (TR 132-33). Claimant stated that the situation in which he would be asked to operate the river tipple would arise when the operator needed to leave the operation area to "unclog the shoot." (TR 133). Between the years of 1997 and 1999, Claimant stated that he operated the tipple for the tipple operator approximately six to eight times. (TR 133).

Claimant went on to explain the use of the D-Stockpile with the aide of CX 5, photo 15-D-18. (TR 133). Claimant explained that the coal in the picture was being stored in that location while a ramp was being built with the use of a bulldozer. (TR 133). Claimant also testified that he pushes coal into the hopper after it is unloaded by a "pan." (TR 133-34).

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[4] Claimant testified that Pond #4 is used for the disposal of slurry. (TR 170). Claimant stated that slate is used for the construction of the "breast" of the pond. (TR 171). Claimant stated further that the trackdozer was being used to push the slate into the pond to make a "footprint." (TR 175). The footprint work began in April or May of 1999 and Claimant worked on making the footprint "off and on" from that time until the time of the injury. (TR 176). This work in Claimant's estimation, took "quite a bit of time." (TR 177).

Claimant stated that while he worked in the D-Stock area he would repair and maintain the hopper as well as the conveyor belt. (TR 136). Between the years of 1990 and 1999, Claimant stated that he engaged in this type of activity "hundreds of times." (TR 137). Claimant went on to state that during this time period he would push coal into the D-Stock hopper sometimes every day. (TR 137).

Claimant then went on to discuss the circumstances surrounding his November 10, 1999 injury. Claimant stated that on that morning, he reported to work at 5:00 a.m. (TR 139). Claimant stated that he first reported to the "boss shanty" and he was told that "nothing special" needed to be completed that morning. (TR 140). At that point, Claimant "went out and started cleaning" around the stoker area. (TR 140). There was some coal located in the stockpile area on this date near the D-Stock hopper. (TR 141). Claimant testified that he then reported to the slate silo and "cleaned that out." (TR 141). Claimant cleared the roads around the slate silo. (TR 141). The slate silo must be unloaded for the operation of the plant. (TR 147). The slate is taken to Pond #4 and is used in constructing the pond. (TR 148). Claimant stated that the slate is transported to the pond by the use of trucks and the slate is pushed out into the water and eventually spread out by a bulldozer. (TR 150). Claimant stated that around the time the sun was rising, he parked the machinery that he was operating and began using his "trackdozer" that was located at Pond #4. (TR 142).

When Claimant arrived at the trackdozer at Pond #4, he filled the transmission with transmission fluid and started the engine. (TR 143). Claimant had placed a five-gallon can on the trackdozer tracks and when Claimant reached for the can his "feet went out from underneath" him. (TR 143). Claimant stated that he then grabbed hold of the "grab bar" and "just dangled there for a while, bounced around a little bit." (TR 143). Claimant proceeded to drop the can and then "dropped to the ground." (TR 143). Claimant testified that he "couldn't pull [himself] up because [his] shoulder was hurting." (TR 143). Claimant also stated that "everything was hurting." (TR 143). Claimant then "shook it off" and believed that he was all right. (TR 143).

Claimant left the trackdozer motor running to let the machinery "thaw out" and reported back to the plant to wait for a pan operator to report to work. (TR 144). Claimant stated that he then began to operate a "Michigan" that had been located near the stoker pile. (TR 145). Claimant was required to climb into the Michigan by use of a vertical ladder, at which time he was unable to climb because his arm "wouldn't hold [him]." (TR 145).

Claimant came to understand that he had torn the rotator cuff in his left arm. (TR 145). Claimant was forced to climb into the Michigan by "wrap[ping]"his left arm around the ladder and was unable to use the left arm to steer the vehicle. (TR 145). Claimant proceeded to finish his work around the D-Stock hopper by pushing coal into the hopper and then reported to Pond #4 to operate the trackdozer. (TR 145).

Claimant stated that between 1988 and 1990, his primary job was to keep the roads clean and clear. (TR 179). Claimant testified that this job would take him all over the plant and into

the stockpile area. (TR 179). Claimant stated that most of his time was spent working on Pond #4 once the construction of that pond was undertaken; however, Claimant also stated that he continued to work cleaning the roads and working at the D-Stockpile while working at Pond #4. (TR 179). Claimant explained that a part of his job duties was to put clean coal into the D-Stock hopper and grade and level the stockpile area. (TR 181-82).

Claimant explained that coal is placed on the D-Stock hopper by a "Terex" or "pan" which, according to Claimant, are the same thing. (TR 185). Claimant stated that he is required to clean the roads and the hopper in order for the Terex to be able to deliver the coal. (TR 187). Claimant stated that while completing his cleaning duties, he pushes coal into the hopper. (TR 187).

In Claimant's estimation, the stockpile was "a pretty good" size in 1998. (TR 189). Claimant did state, however, that most of the coal loaded onto the barges did not come from the stockpile, but from the plant itself. (TR 189). Claimant also explained that he worked on the unloader three or four times up until 1997. (TR 192).

Claimant testified that he has operated the river tipple in the past and that he was certified to perform this function between 1994 and 1997. (TR 194). However, Claimant admitted that he was not certified to operate the new computer system installed at the tipple. (TR 195). Claimant stated that he did watch the tipple system boards for operators on six to eight occasions while the operator would unclog the chute. (TR 195). Claimant was never asked to perform these functions by any member of management. (TR 196).

Claimant has been paid workers compensation at a rate of $588.00 per week by Respondent pursuant to the state workers' compensation statute. (TR 202). Claimant explained that it was not his choice to be paid under this statute. (TR 202). Up until the date of the accident, Claimant would work twelve and one-quarter hours per day. (TR 204). In 1999, Claimant stated that he would spend approximately seven and one-half to eight hours per day at Pond #4, but that the remainder of his time was spent working around the D-Stock area because the "D-Stock area is the number one priority." (TR 205).

Claimant explained that he would work on the stoker coal when the plant "goes down." (TR 207). Claimant's job was to keep the stoker pile flat and keep a pathway clear for the Terex to be able to dump coal into the D-Stock hopper. (TR 208). Claimant testified that he also pushes the stoker coal into the D-Stock hopper after it is unloaded. (TR 209). Claimant testified in the months leading up to the November 1999 injury, Claimant worked around the S-Stock area "about every morning," as well as loading approximately five barges of stoker coal per week. (TR 210). Claimant specifically remembers pushing coal into the D-Stock hopper on the day that he was injured. (TR 211).

Jack Ross

Mr. Jack Ross testified at the time of the hearing in this matter. Mr. Ross testified that he works as a marine consultant and that he operates Captain Jack Ross and Associates, Inc. (TR 31). Mr. Ross stated that he provides "general technical services to the marine industry, both to people engaged in the barge and towing end of the industry and, to some extent, to pleasure boat people." (TR 31). Principally, Mr. Ross described his activities "designing docks and terminals." (TR 31).

Mr. Ross stated that he frequently testifies to the issue of whether a person should qualify as a longshoreman.[5] Mr. Ross went on to state that he has a "general idea" of how preparation plants such as Robena operate. (TR 35). Mr. Ross has based his opinion of Claimant's work environment on multiple interviews with Claimant and documents relating to Claimant's work history. (TR 36). Mr. Ross testified that he has become aware that Claimant worked at Robena and that the purpose of the Robena facility is to "unload coal from barges." (TR 38). Mr. Ross went on to state that "coal is processed, it's cleaned, it's blended, stockpiled, and then eventually relocated into barges for delivery to the ultimate consumer." (TR 38).

Mr. Ross also stated that the entire "operation [at Robena] involves loading and unloading coal." (TR 38). Mr. Ross also went on to explain how Robena operates.

> The coal arrives in barges, and the coal is unloaded by a continuous bucket machine. Then a conveyor belt takes it to a silo or a distribution tower where other belts can take it to different places. That coal can go directly into the washer, which is a big building where the coal is cleaned, washed. Another belt can take it to a stockpile. Another belt can take it direct to the tipple whether it's loaded back into barges. It just depends on what is intended or needed at that time how the operation is, is structured at that particular time.

(TR 39).

Mr Ross testified that coal is placed in a stockpile that is then pushed by bulldozer into a hopper. (TR 42). The hopper then feeds the coal onto a belt which carries the coal to the

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[5] Respondent has placed on the record a continuing objection to Mr. Ross' testimony. Respondent alleges that Mr. Ross should not be permitted to testify to a question of law and since the only issue in this claim is jurisdiction, Mr. Ross' testimony should be excluded. The question of status under the Act is now essentially a question of fact unique to each claim. *See Sylvester v. Bath Iron Works*, 34 BRBS 759 (ALJ 2000); *Wakely v. Eastern Shipbuilding, Inc.*, 34 BRBS 788 (ALJ 2000). While some of Mr. Ross' testimony may touch on the ultimate legal issue in this claim, this Court has considered his testimony purely as factual, and not legal in its conclusions.

distribution tower. (TR 42). The coal then is transported to a washer, then on to the tipple where the coal is reloaded into the barges. (TR 51). Mr. Ross went on to state that one of Claimant's primary duties was to push the coal into the hopper with the use of a bulldozer. (TR 42). Mr. Ross opined that because Claimant pushed the coal into the hopper and that coal was eventually loaded into the barges through the tipple, that Claimant was involved in the process of loading coal. (TR 52). Mr. Ross also testified that Claimant operated the tipple to load the coal and would also assist in maintaining the haulage equipment for the barges. (TR 42). Mr. Ross opined that this activity is "essential for the movement of coal." (TR 52).

Mr. Ross testified that he is aware of the area where Claimant was injured and that the Plant Pond #4 area is approximately 880 yards from the river. (TR 54). Mr. Ross went on to testify that Pond #4 is used for the disposal of slurry. (TR 55). Mr. Ross stated that at the time of his injury, Claimant was engaged in moving slate at Pond #4 to increase the capacity of the pond for slurry disposal. (TR 56).

Mr. Ross opined that Claimant was engaged in maritime activity at the time of the injury. (TR 58). Mr. Ross bases this opinion on consideration of the totality of Claimant's employment. (TR 58). "Even though some of these activities are somewhat separated from the actual movement of cargo, they are all in support of the base mission of the facility." (TR 58). Mr. Ross went on to state that Claimant spent a portion of his time moving coal from the D-stock hopper onto the conveyor belts that ultimately carries the coal to the river tipple and into the barge. (TR 59).

Mr. Ross testified that he believes the "entire 1280 acres" of Robena would qualify as "a maritime place of employment" because Robena is a "contiguous area and everything that happens [at Robena] is related to the basic mission of the facility" of "handling coal." (TR 59). Mr. Ross is basing this assessment on his experience with facilities similar to Robena, although he has not visited Robena itself. (TR 60).

On cross-examination, Mr. Ross stated that while he has no formal training in coal preparation or processing, he is familiar with the way such facilities operate. (TR 68). Mr. Ross also stated that he last visited Robena in the late 1970s, and that he was not involved in the building of the docks at Robena. (TR 70). Mr. Ross also stated that his only knowledge of Claimant's job duties is what Claimant reported to him. (TR 76).

Mr. Ross acknowledged that Claimant's primary job was as a bulldozer operator. (TR 82). Mr. Ross pointed out, however, that Claimant had reported to him that at one point or another in his career with Respondent, he had worked to maintain or repair all of the belts in the plant. (TR 87). Mr. Ross also indicated that he understands that Claimant operated the bulldozer at both Pond #4 and at the stockpile area. (TR 84). Based on his experience and Claimant's information, Mr. Ross stated that he would not characterize the function of Robena to be preparing and processing coal. (TR 88).

Mr. Ross also reiterated that while he believes the entire Robena property to be a "maritime situs," he does not believe each person working at the location to be a longshoreman. (TR 88). Mr. Ross clarified that in order for him to classify a worker as a longshoreman, the person "must do something in handling the coal." (TR 88). Mr. Ross testified that even if Claimant only engaged in his bulldozing work at Pond #4 or if Claimant only episodically pushed coal into the hopper, Claimant would qualify as a longshoreman. (TR 89).

Harry Swaney

Mr. Harry Swaney testified at the formal hearing in this claim. Mr. Swaney stated that he began working at Robena in 1968, but only began working for Respondent in 1984. (TR 215). At the Robena Preparation Plant, Mr. Swaney worked as a mechanic, bolter, fireman, and heavy equipment or grade operator. (TR 216). Mr. Swaney stated that he is familiar with the process at Robena and worked there for approximately 15 years, retiring in March 1998. (TR 216 & 221).

Mr. Swaney explained that the coal arrives by barge and is placed in a silo and is then transported to the washer. (TR 217). Mr. Swaney stated that the coal is washed and screened and is separated from the slate which is transferred to the "slink." (TR 217-18). After the coal is washed, it is transported back into the barges through the river tipple. (TR 218). Mr. Swaney explained further that the slate is taken from the slate silo to either the "pile" or to the slurry pond. (TR 218).

Mr. Swaney stated that he began working as a mobile equipment operator at Robena in 1991 or 1992. (TR 219). Mr. Swaney testified that he worked with Claimant from 1992 to 1997 and that they would start their work day at 4:00 a.m. (TR 219). Mr. Swaney further testified that he observed Claimant operating the river tipple and stated that the "foreman who is on midnight shift would tell [Claimant] to go down and run the river tipple and [Mr. Swaney would] have to put coal in the D-Stock belt, the stockpile, you know. Pick the coal up and put it in the D-Stock belt." (TR 220).

Mr. Swaney stated that after the coal goes into the D-Stock hopper, the coal is transported to the transfer belt and then on to the river tipple. (TR 221). Mr. Swaney testified that the coal would be sent "down to [Claimant], then he could load the barges before the day shift got in there." (TR 221). Mr. Swaney stated that this activity would occur one to three days per week. (TR 221). Mr. Swaney went on to discuss his duties as a mobile equipment operator.

Mr. Swaney testified that "sometimes [he would] be hauling slate, sometimes [he would] be on roads, sometimes putting coal in the hoppers ... then when day shift came on they'd have [him] doing something else." (TR 222). Mr. Swaney explained that the responsibility to work around the D-Stockpile and D-Stock hopper belonged to him and Claimant. (TR 222). Mr. Swaney stated that he and Claimant would push the stockpiled coal into the D-Stock hopper and would work in the area surrounding the D-Stock hopper "about every day." (TR 223).

Mr. Swaney stated that from 1993 until his retirement in 1998, he did not perform any jobs outside of his classification on his own. (TR 224). Mr. Swaney testified that in emergency situations, he would be called upon to shovel spilled coal with other co-workers. (TR 224). Mr. Swaney also worked as a mechanic at Robena. (TR 225). In his capacity as a mechanic, Mr. Swaney would work on screens, rollers, and repair belts at the river tipple and repairing the barge unloader. (TR 225). Shoveling in the event of a coal spillage is the only activity that Mr. Swaney remembers completing outside of his work classification. (TR 227).

Mr. Swaney clarified that he ceased to work at Robena on November 11, 1997 and that he missed significant amounts of work after 1994 because of a knee injury. (TR 229-230). Therefore, Mr. Swaney stated that he had no direct knowledge of Claimant's job duties after November, 1997 nor for the time that Mr. Swaney was off work because of the knee injury prior to November 1997. (TR 238). Mr. Swaney was also not Claimant's supervisor. (TR 232).

Larry Burden

Mr. Larry Burden testified on behalf of Claimant in this claim. Mr. Burden testified that he worked for Respondent for ten to twelve years, ending September 9, 1999. (TR 237). Mr. Burden began working in the blending bin at Robena in 1988 or 1989. (TR 238). Mr. Burden worked as a "first helper, ... beltman, barge unloader, [and] truck spotter." (TR 238). Mr. Burden's last job at Robena was as a barge unloader and the coal would go to "the plant, on the belt, on the C4, to C8, up to the plant." (TR 239).

Mr. Burden testified that he worked with Claimant at the river tipple and Mr. Burden would dump the coal and Claimant would then "push the coal back" in the D-Stock area. (TR 241). Mr. Burden testified that he remembers Claimant being called to the river tipple to complete repairs on the running lines on the unloader. (TR 241). Mr. Burden explained that the running lines move the barges up and down the river. (TR 241). Mr. Burden remembered calling Claimant at the river tipple in 1997 "when he was unloading coal down there." (TR 242).

On cross-examination, Mr. Burden clarified that he was not present at Robena when Claimant suffered his injury and that from September 9, 1999 on, Mr. Burden has no first hand knowledge of Claimant's job duties. (TR 246). Mr. Burden testified that he worked with Claimant for approximately seven years, and that the events described in Mr. Burden's affidavit could have occurred at any point during those seven years. (TR 251). Mr. Burden explained that he worked with Claimant when Mr. Burden was working midnight shift because Claimant would begin work at 4:00 a.m. (TR 255). Mr. Burden testified that he did not observe Claimant operating the river tipple after 1997. (TR 260).

Darrell A. Smith

Mr. Darrell A. Smith is employed by Respondent as a plant superintendent. (TR 264). Mr. Smith described his duties as plant superintendent to include being "responsible for the...safe operation, production, quality, supply costs of the ... whole facility there at Robena. And environmental concerns, and working with MSHA, and the UMWA contract, and all the labor concerns." (TR 264). Mr. Smith has been employed at coal preparation plants since 1982. (TR 265). Mr. Smith explained that the coal arriving at Robena for processing is transported exclusively by barge. (TR 271). Mr. Smith went on to explain the route the coal travels once it arrives at Robena.

The coal is removed from the barges by "bucket excavators." (TR 273). After the coal is loaded into the buckets, it is taken up "the C4" conveyor belt into a surge bin and then into "the blue snake," with the coal eventually arriving at the blending bins. (TR 273, 274). Mr. Smith went on to explain that the coal comes out of the top of the surge bin and goes directly to the silo. (TR 274). The raw coal is then taken from the bottom of the silo and is transported into the plant. (TR 274).

Mr. Smith explained that the barge unloader starts the buckets operating, with the running line controlling the speed of the barges moving under the unloader. (TR 275). An operator is in the control booth and is responsible for operating the unloader. (TR 275). Mr. Smith testified that there are two people on the river that assist in bringing the barges in to be unloaded. (TR 275). The barges are unloaded through a completely mechanical procedure. (TR 276).

All of the unloading occurs at the tipple. (TR 276). Mr. Smith went on to explain that after the coal is loaded into the unloader buckets, the coal is transferred up on "conveyor #3 and into bin #1." (TR 278). This bin serves as a transfer point from which the coal is placed on "silo feed conveyor #18." (TR 278). Mr. Smith testified that since the implementation of a new silo in early 1997, the blending bin is no longer in use. (TR 279).

According to Mr. Smith, the coal is then placed in the raw coal silo and from there conveyed to the plant itself. (TR 280). "[S]izing, processing, and dewatering" all occur in the plant. (TR 281). Mr. Smith went on to explain the process by which the coal leaves Robena.

Mr. Smith indicated that the coal also leaves Robena by barge, with coal leaving Robena by truck on a "very infrequent" occasion. (TR 282). Robena is supplied by Dilworth Mine and some of the coal that arrives is "split off" to make stoker. (TR 283). The "regular coal" will be returned directly to the barge for shipment unless there exists a barge shortage that requires the coal to be put "on the ground." (TR 283). Mr. Smith testified that coal has not been put "on the ground" very much in the recent past. (TR 283).

Mr. Smith stated that the coal can be blended directly from the silo by using a computer system. (TR 284). Mr. Smith described the blending of coal to be "integral" to the processing and preparation of the coal. (TR 284). The coal is then transferred from the plant to the tipple by conveyor belt and the coal is loaded into the barges at the river tipple. (TR 285). Mr. Smith described the river tipple as "a storage bin of some sort." (TR 285).

Mr. Smith described the loading at the river tipple as an "automated process." (TR 286). This automated system was implemented in 1998 and the system monitors the coal levels and is controlled by an operator. (TR 286-87). Mr. Smith then explained the significance of stoker coal. Stoker coal is a special type of coal that is shipped out to specific customers. (TR 287). Mr. Smith estimated that 40 to 60 barges of stoker coal are produced yearly. (TR 287). This stoker coal is loaded through the river tipple as fed by the D-Stock hopper. (TR 288).

Mr. Smith also described stockpile coal. Stockpile coal, according to Mr. Smith, is produced when "you have a lack of barges or not a customer at that time." (TR 289). This coal is commonly brought to Robena via truck and is placed in the D-Stockpile and sent through the plant via the D-Stock hopper. (TR 289). Mr. Smith estimated that in 1999, D-Stock coal produced less than 10% of Respondent's profit. (TR 289).

Mr. Smith then continued to explain the path that is traveled by the coal at Robena. Mr. Smith testified that the coal from the D-Stockpile is pushed through the D-Stock hopper and travels on the D-Stock belt to the transfer house. (TR 290). The coal then travels "via 85" belt to the plant or to the river for loading. (TR 290). If the coal is sent to the river for loading, it travels on the river tipple belt into shuttles and then into bins. (TR 290). The coal then is placed on seven feeder belts that feed the chutes that load the coal into the barges. (TR 290).

Mr. Smith testified that normally, the coal loaded through the D-Stock hopper is loaded into the hopper by Terex. (TR 292). The Terex acts as "a scraper" that is taken across the coal pile and scoops up the coal and places it into the Terex. (TR 292). The Terex transports the coal to the D-Stock hopper and dumps the coal through the "grizzly" into the hopper. (TR 292).

Waste is disposed of at Robena at Pond #4 or a "valley fill." (TR 293). Mr. Smith went on to discuss Pond #4. The pond was originally constructed by U.S. Steel, according to Mr. Smith. (TR 293). Respondent gained approval for "upstream construction" which occurred in two phases. (TR 293). The first phase of the construction began in 1996 and the second phase was completed in 2001. (TR 294). Mr. Smith stated that both slate and slurry are disposed of at Pond #4. (TR 295).

Mr. Smith went on to discuss Claimant's work duties and job classification. Mr. Smith testified that at the time of Claimant's November 11, 1999 injury, Claimant was employed as a mobile equipment operator. (TR 300). At that time, Claimant's primary job duty was to create a footprint for the second phase of the Pond #4 construction. (TR 300). Mr. Smith stated that

most of Claimant's work day was spent in the construction of Pond #4 because Claimant was the only person at Robena certified to operate the bulldozer. (TR 300-301).

Mr. Smith stated that in order to complete upstream construction, that "course refuse [must be pushed] over old slurry." (TR 302). Mr. Smith stated further that he observed Claimant's work duties and that an "operation maintenance log" is kept by the foreman for each shift to reflect what duties were completed by each employee during that day. (TR 303).

Mr. Smith reviewed a summary of the operational maintenance log as it pertains to Claimant. (TR 304, referencing RX S). The logs were summarized to include the duties that Claimant performed between March 2, 1997 and December 31, 1999. (TR 304). Mr. Smith discussed Claimant's job duties in November 1999, based on the operational summaries and personal observations. Mr. Smith admitted that the logs are not real specific as to the duties performed by the employees and that the entries in the logs are made by different people. (TR 318). Mr. Smith explained that Claimant would clean the main entrance at Robena which was located near the slate silo on each shift. (TR 307). Additionally, it was necessary to have a bulldozer operator present at the Pond #4 construction. (TR 308). Claimant's job duties also included grading the stockpile, building ramps when D-Stockpile coal was "put down," and would sometimes have to push coal in through the D-Stock hopper when coal was brought in from a coal mine other than Dilworth.[6] (TR 309).

Mr. Smith estimated that "very little" of Claimant's actual work time would have been spent working at the D-Stockpile in November 1999 because the focus at Robena was on the construction of Pond #4. (TR 309). Mr. Smith explained that it is easier to load coal through the D-Stock hopper with a Terex rather than a bulldozer. (TR 310). Mr. Smith described the use of a bulldozer to push coal into the D-Stock hopper as "incidental to the process of clearing and cleaning the area." (TR 310).

Mr. Smith explained that a new river tipple system was implemented in 1998 and that Claimant had not been assigned to operate the river tipple since the introduction of the new system. (TR 311). Mr. Smith also indicated that Claimant was not assigned to operate the river tipple as a regular part of his job duties. (TR 311). Mr. Smith stated that it was also not a part of Claimant's regular job duties to repair or maintain the river tipple and that Claimant had not been trained as a riverman. (TR 312). Mr. Smith stated further that Claimant's duties did not include cleaning loader or unloader spills "unless it was a big" spill. (TR 312).

Mr. Smith testified that Claimant was neither trained nor qualified to work as an unloader since Mr. Smith became the plant superintendent. (TR 313). Mr. Smith also testified that Claimant has not been qualified or trained to operate the barge loader since the system was

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[6] Mr. Smith indicated that outside coal was received approximately three or four times in the previous 6 years. (TR 309).

changed in 1998. (TR 313). Neither of these duties are a part of Claimant's regular job duties, according to Mr. Smith. (TR 313).

Mr. Smith stated that while Claimant is certified to operate a Terex, Claimant would do so only "very seldom[ly]." (TR 316). In Mr. Smith's opinion, bulldozers are never used to push coal into the D-Stock hopper. (TR 315). Mr. Smith also indicated that the majority of the coal that is sent up on the D-Stock belt enters the river tipple. (TR 317). Mr. Smith stated that Claimant had previously been trained as a mechanic and that Claimant would be called to work as a mechanic on heavy equipment only in an emergency. (TR 321). Mr. Smith also indicated that "at times" employees are assigned to jobs outside of their classifications, and that Claimant worked in jobs outside of his classification "at times." (TR 324). Mr. Smith stated that "very seldom" would Claimant be assigned to "prepare and maintain conveyor belts." (TR 325).

Claimant "could have been" assigned to repair and maintain the river tipple, the loader, the unloader, and conveyor belts based on Claimant's training from May 1999 to May 2000. (TR 326). However, Mr. Smith indicated that he had never personally observed Claimant working on the unloader. (TR 326). Mr. Smith testified that Claimant did not work in the D-Stock area everyday, but Claimant would be in this area if "picking up or stokering," but that such activities did not occur on a weekly basis. (TR 327). Mr. Smith stated that Claimant may have "regularly" worked in the D-Stock area "at times." (TR 327).

Mr. Smith stated that if the coal in the D-Stockpile area is correctly placed by the Terex, then there would be no need for a bulldozer to push the coal into the D-Stock hopper. (TR 327). In November, 1999, Mr. Smith stated that 18,000 tons of D-Stock were processed, but this amount is "very little" when compared to the general amounts at Robena. (TR 332). Also in November 1999, six stoker barges were loaded at Robena, which Mr. Smith characterizes as "very small" in amount compared to the total output at Robena. (TR 332). No D-Stock nor stoker barges were loaded on November 11, 1999. (TR 332).

Claimant's Evidence

In support of his claim for benefits, Claimant has submitted 18 exhibits. Included in these exhibits are various photographs and diagrams of Robena. (CX 5, 6, 7, 8, 9, 16, & 17). These photographs have been reviewed in connection with the testimony offered regarding the subjects of the photographs. Also included in these exhibits is the documentation filed in connection with Claimant's filing for benefits under the Act as well as the documents pertaining to Claimant's payment for workers' compensation from the Commonwealth of Pennsylvania. (CX 1, 2, & 3). Of importance from these documents is the fact that Claimant last worked on December 27, 1999. (CX 2). Claimant has been paid state workers' compensation benefits beginning on December 28, 1999 at a compensation rate of $588.00 and based on an average weekly wage of $1,776.00. (CX 3).

Claimant's work history with Respondent is also included in the record. (CX 4). Claimant began working at Robena on April 5, 1965. (CX 4). On February 13, 1985, Claimant began work as a mobile equipment operator, crane, dozer, and clam. (CX 4). Also included in the record is a task training log that pertains to Claimant's training. (CX 14). Claimant was logged to have been trained to operate the tipple on June 5, 1997. Claimant was also noted to have been trained to operate the river tipple barge loader on October 19, 1994, and was observed doing this job in 1995 and 1996. (CX 14). Claimant's certificates of training for his work time at Robena are also included in the record. (CX 15).

Three affidavits are included in the record in this claim. The affidavits cover the testimony of Mr. Swaney, Mr. Burden, and Mr. Ross and will therefore be discussed no further. (CX 10, 11, & 12). Mr. Ross' resume includes 40 years of experience "in commercial vessel operations as an owner, pilot, operator, and marine contractor." (CX 13). Mr. Ross also indicated that he has worked as a consultant for towing companies, barge lines, marine contractors, terminal operators, and government agencies. Mr. Ross also stated that he has designed various marine structures. Mr. Ross has indicated that he has "[e]xtensive experience in marine construction, pile driving, dredging, salvage, underwater demolition, bridge and pipeline projects, cofferdams and dewatering." Mr. Ross authored "technical articles appearing in the *Waterways Journal* and other maritime publications; he is also the editor and publisher of *As They Say On the River,* a dictionary of Western Rivers towing." Mr. Ross also detailed his recreational boating background and forensic activities. The final exhibit offered by Claimant is a citation against Respondent for failing to report Claimant's injury that was terminated on August 3, 2001 when the violation was corrected. (CX 18).

Respondent's Exhibits[7]

In support of its position in this matter, Respondent submits 32 exhibits.[8] Included in these exhibits are various photographs of Robena and a videotape detailing the coal preparation process. (RX J, K, L, M, N, O, P, Y, Z, AA, BB, & CC). Respondent has also included in the record in this claim Claimant's Notification of Permanent Job Vacancy Award dated February 13, 1990 when Claimant was selected to fill a vacancy as a "Mobile Equipment Operator - Crane, Dozer, Clam." (RX E). Information pertaining to an October 3, 1992 injury, an April 8, 1993

[7] Several of these exhibits appear to be of little relevance to the issue before this Court. While the exhibits have been reviewed, a summary of the information provided therein need not be discussed at length. (RX A, B, and C). The affidavit of Mr. Smith is also included in the record. As this affidavit includes the testimony offered by Mr. Smith at the time of the hearing in this matter, it need not be discussed further. (RX FF).

[8] Several of these exhibits are duplicates of Claimant's exhibits. As these exhibits have already been discussed, they will not be discussed again in this section. (RX D is the same as CX 4, RX F is the same as CX 2, RX Q is the same as CX 17, RX R is the same as CX 8, RX T is the same as CX 14, RX EE is the same as CX 3).

injury, and a March 2, 1995 injury are also included in the record in the present claim for benefits. (RX G, H, I, U, V, W, & X).

Claimant's work assignments from March 4, 1997 through December 21, 1999 are detailed by Respondent. (RX S). This exhibit was discussed at length in the hearing testimony summarized above, and therefore need not be discussed in detail at this point. The report pertaining to Claimant's November 10, 1999 injury is submitted for consideration. (RX DD). This report details that at the time of Claimant's 1999 injury, Claimant was classified as a mobile equipment operator and details the time, date, and circumstances surrounding Claimant's injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[9]

As a preliminary matter, Claimant has invoked the presumption of jurisdictional coverage provided in Section 20(a) of the Act to confer jurisdiction in the above-captioned claim. Contrary to Claimant's assertions, there is no presumption of coverage under the Act. The Benefits Review Board (hereinafter "Board") has held consistently that the Section 20(a) presumption does not apply to coverage under the Act. *Sedmak v. Perini N. River Assocs.*, 9 BRBS 378 (1978), *aff'd sub nom. Fusco v. Perini N. River Assocs.*, 622 F.2d 1111 (2nd Cir. 1980), *cert. denied* 449 U.S. 1131 (1981). "The Section 20(a) presumption does not apply to the legal interpretation of the jurisdictional provisions of the Act." *Coyne v. Refined Sugars, Inc.*, 28 BRBS 372, 373-74 (Nov. 28, 1994).

Accordingly, Claimant is not entitled to invoke the presumption located at Section 20(a) in order to establish jurisdiction in this claim. In order to establish coverage under the Act, Claimant must establish that he is a maritime worker covered by the Act. To do this, Claimant must establish both the status and situs requirements.

Sections 2(3) and 3(a) of the Act set forth the requirements for coverage. "Status" refers to the nature of the work performed; "situs" refers to the place of performance. Prior to the enactment of the 1972 Amendments, the Act contained only a situs test. *Nacirema Operating Co. v. Johnson,* 396 U.S. 212 (1969). One of the motivations behind the 1972 Amendments, however, was the recognition that modern cargo-handling techniques had moved much of the longshore worker's duties off of vessels and onto the land. *Northeast Marine Terminal Co. v. Caputo (Caputo),* 432 U.S. 249 (1977). Accordingly, the covered situs of Section 3(a) was

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[9] The findings and conclusions which follow are based upon my observations of the appearance and demeanor of the witnesses who testified at the hearing as they affect the credibility of those witnesses, and upon an analysis of the entire record, including the testimony and documentary evidence, in light of the arguments presented, the statutory law and applicable regulations, and the applicable case law. Any evidence in the record which has not been discussed specifically has been determined to be immaterial, or to be insufficiently probative to affect the outcome of the decision.

expanded, and a status test was added, extending coverage to "maritime employees," including, but not limited to longshore workers, harbor workers, ship repairers, shipbuilders, and ship breakers.

The intent of the 1972 Amendments was to add additional workers to coverage, not to exclude from coverage any employee who is injured in employment on actual navigable waters and who therefore would have been covered under the original act. The definition of "employee" was amended to include:

> [a]ny person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker ...

33 U.S.C. § 902(3).

However, a string of cases decided by the United States Supreme Court (hereinafter "Supreme Court") addressing Section 2(3) has left it "clearly decided that, aside from the specified occupations, land-based activity occurring within the Section 3 situs will be deemed maritime only if it is an integral part of loading or unloading a vessel." *Chesapeake & Ohio R.R. v. Schwalb,* 493 U.S. 40, 45 (1989). *See also P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69, 80 (1979).

As this claim arises within the jurisdiction of the Third Circuit, it is necessary to examine the existing law in that Circuit. The United States Circuit Court, Third Circuit (hereinafter "Third Circuit") has detailed the history and purpose of the 1972 Amendments thoroughly in *Sea-Land Service Inc. v. Rock,* 953 F.2d 56 (3rd Cir. 1992). In doing so, the Third Circuit has offered considerable guidance on the reach of coverage afforded by the Act. In *Rock*, the Court found that the claimant was not entitled to coverage under the Act because "Rock's work was simply too far remote from the chain of events directly leading to the loading of cargo." *Id.* at 66.

The claimant in *Rock* was employed as the driver of a "courtesy van" that was used primarily within the employer's "200-acre container loading and unloading terminal." *Id.* at 59. The vans which Rock operated were used for the transportation of "executives, visitors, seamen, ship's crewmen, clerical workers, customs officials, and customers." *Id.* Any longshoreman employed at the employer's facility were transported via alternate means for which Rock had no responsibility. *Id.* Rock was also not responsible for transporting any cargo and did not repair or maintain any equipment. *Id.*

Rock injured his knee stepping out of his van while in the course of his employment. *Id.* In determining whether Rock was entitled to coverage under the Act, the Third Circuit reviewed the purpose behind the 1972 Amendments to the Act as well as the Supreme Court's interpretation of those Amendments. The 1972 Amendments instituted a two-part test to determine coverage under the Act. *Id.* at 60. The Third Circuit went on to explain that "[t]he Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or

building a vessel, just because they are injured in an area adjoining navigable water used for such activity." *Id. citing* H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. 11 (1972). However, the 1972 Amendments left the scope of marine employment "imprecise." *Id.*

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered for part of their activity. To take a typical example, cargo, whether in break or bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area ... [E]mployees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo.

Id. at 60-61 *citing* H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. 10-11 (1972). The Third Circuit went on to state that the example offered by the Committee illustrates that marine employment "must have some nexus to the loading and unloading of cargo," however, the example is not meant to be all inclusive. *Id.* at 61.

The Third Circuit went on to discuss the Supreme Court's interpretation of the 1972 Amendments. The Third Circuit explained that the 1972 Amendments are to be liberally construed because

> this construction [will] fulfill the purpose of the Act by generously covering those who were formerly subject to the shifting compensation schemes and those who are involved in the loading and unloading process, but who previously may not have been covered because of their wholly land-based functions. But neither the Court nor Congress intended to expand coverage to those wholly uninvolved with ship-building or loading or unloading cargo.

Id. at 61.

> [In enacting the maritime employment requirement,] Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading: it is 'clear that persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered.' While 'marine employment' is not limited to the occupations specifically mentioned in §2(3), neither can it be read to eliminate any requirement of a connection with the loading or construction of ships. As we have said,

> the 'maritime employment' requirement is 'an occupational test that focuses on loading and unloading.' The Amendments were not meant 'to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.' We have never read 'maritime employment' to extend so far beyond those actually involved in moving cargo between ship and land transportation.

Id. at 62-63 *citing Herb's Welding,* 470 U.S. 416, 423-24 (1985).

The Third Circuit has interpreted this holding in *Herb's Welding* to be the outer limits of coverage under the Act. *Id.* at 63. The Third Circuit went on to discuss the Supreme Court's holding in *Schwalb.* The Supreme Court in *Schwalb* found coverage under the Act for janitorial employees who were "injured while maintaining or repairing equipment essential to the loading or unloading process." *Id.* at 63 *citing Schwalb* 493 U.S. at 43. The Supreme Court went on to hold that "[t]he determinative consideration is that the ship loading process could not continue unless the retarder that [the employee] worked on was operating properly." *Id.* at 63 *citing Schwalb,* 493 U.S. at 48.

The Third Circuit has held that to determine eligibility for coverage under the Act, an "integral part" or "necessary ingredient" test should be employed. *Id.* at 64. Additionally, the Third Circuit "[r]equires some nexus between the employee's activities and either cargo-handling or shipbuilding, the primary functions of the major areas of occupation listed in section 902(3)." *Id.* at 65. In *Rock,* the Third Circuit found that the process the cargo undergoes would be "completely unaffected" if Rock's position was eliminated. *Id.* at 67. The Third Circuit went on to explain that "[l]and-based activity occurring within the section 903 situs, other than those activities explicitly listed in section 902(3), should be deemed maritime only if it is an integral or essential part of the chain of events leading up to the loading, unloading, or building of a vessel." *Id.* at 67.

STATUS

Applicable Law

> Compensation shall be payable ... if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel).

33 U.S.C. § 903(a) (1972).

Maritime employment has been defined by the Supreme Court to include "employees on the situs involved in the essential or integral elements of the loading or unloading process," and to exclude those employees who do not meet this criteria. *Nelson*, 953 F.2d at 61 *citing Schwalb*, 493 U.S. at 46, and *Herb's Welding*, 470 U.S. at 423-24. The Third Circuit further explained its position regarding the status of an employee engaged in maritime employment in *Nelson v. American Dredging Co.*, 143 F.3d 789 (3rd Cir. 1998).

Nelson was employed as a bulldozer operator on a beach reclamation project to widen an already existing beach. *Id*. at 791. The sand to widen the beach was "obtained from the ocean floor approximately ten miles from the beach by a hopper dredge." *Id.* The sand was transported to the beach via an underwater pipeline that pumped the sand from the hold of the hopper dredge. *Id*. The depositing of the sand was controlled by "moving the pipeline along the beach, by adding sections thereto, and by a system of valves on the pipeline." *Id.* The sand was then distributed by use of the bulldozer once it was on the beach. *Id.*

Nelson's job was to utilize the bulldozer to "maneuver and otherwise work the pipeline as it unloaded the sand from the hopper dredge." *Id.* It was also Nelson's "job to move the pipeline from place to place along the beach, add sections to it, and manipulate the valves to facilitate the unloading process." *Id*. Nelson was injured while operating his bulldozer approximately fifty feet from the water's edge when he slipped and fell dismounting the bulldozer to change a pipeline valve. *Id.* at 792.

The Third Circuit held that the sand being pulled off of the ocean floor was being "loaded" into the hold of the hopper dredge and that load of sand was transported by the vessel to the beach. *Id.* at 798. The sand was found to be "unloaded" when it was transferred through the pipeline and eventually reached the beach where it was unloaded through the use of the bulldozer. *Id*. The Third Circuit found that Nelson was essential to the unloading process because by the use of his bulldozer, he moved the pipeline into a position to distribute the sand onto the beach. *Id.* at 799.

A part of Nelson's job was to grade the sand on the beach, and the Third Circuit determined that even if this aspect of Nelson's job was not considered a part of the unloading process that Nelson's activities still constituted unloading because "in all other respects Nelson was directly and intimately involved in unloading the hopper vessel." *Id*. at 799. The Court explained that "Nelson ... was at the exit end of a pipeline contemporaneously performing functions essential to the unloading of sand from a vessel by this pipeline." *Id.*

The Supreme Court has handed down several decisions that address the issue of the status of a worker. In 1977, the Court faced the issue of whether two employees were covered employees under the Act. In *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977), an employee, Blundo, was employed as a "checker" and was responsible for "checking and recording cargo as it was loaded onto or unloaded from vessels, barges, or containers."

Blundo's job duties could change in the process of a work day if other assigned tasks were completed. *Id.* at 253.

> It was Blundo's job to break the seal that had been placed on the container in a foreign port and show it to the United States Customs Agents. After the seal was broken, Blundo was to check the contents of the container against a manifest sheet describing the cargo, the consignees, and the ship on, and port from which, the cargo had been transported. He was to mark each item of cargo with an identifying number. After the checking, the cargo was to be placed on pallets, sorted according to consignees, and put in a bonded warehouse pending customs inspection. Blundo was injured as he was marking the cargo stripped from the container, when he slipped on some ice on the pier.

Id. at 253.

The second claimant, Caputo, was employed as a member of a "longshoring gang." *Id.* at 255. When Caputo was not needed as a part of his usual "gang," he would be hired out of a "waterfront hiring hall" when workers were needed. *Id.* at 255. On the date of his injury, Caputo had been hired as a "terminal laborer" and "was injured while rolling a dolly loaded with cheese into a consignee's truck" on the 39th Street Pier in Brooklyn, New York. *Id.*

The Court explained that determining whether these two employees met the status requirement, would require an analysis of whether they were "engaged in maritime employment' and therefore 'employees' at the time of their injuries." *Id.* at 265. The Court went on to explain that

> [t]he closest Congress came to defining the key terms is the 'typical example' of shoreward coverage provided in the Committee Reports. [Citation omitted]. The example clearly indicates an intent to cover those workers involved in the essential elements of unloading a vessel taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area. The example also makes it clear that persons who are on the situs but are not engaged in the overall process of loading or unloading vessels are not covered.

Id. at 266-67.

The Court held further that "[i]t seems clear, therefore, that when Congress said it wanted to cover 'longshoremen,' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations." *Id.* at 273. The Court went on to find that Blundo was covered by the Act because his job was "clearly an integral part of the

unloading process as altered by the advent of containerization and was intended to be reached by the Amendments." *Id.* at 271.

The Court also found Caputo to be an employee covered by the Act because he had been hired as a terminal laborer and as such, "he could have been assigned to any one of a number of tasks necessary to the transfer of cargo between land and maritime transportation." *Id.* at 273-74. The Court further held that Caputo was a covered employee because not "only did [Caputo] have no idea when he set out in the morning which of [the tasks enumerated by the Court] he might be assigned, but in fact his assignment could have changed during the day." *Id.* at 274.

The Supreme Court further elaborated on the concept of status in *P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69 (1979). Ford was employed out of a local warehousemen's union where the union contract indicated that warehousemen were not to "move cargo directly from a vessel either to a point of rest in storage or to a railroad car nor may they move cargo from a shoreside point of rest directly onto a vessel." *Id.* at 71. Ford's job was to fasten military vehicles onto railroad flatcars. *Id.*

The second claimant in *Pfeiffer*, Bryant, worked as a cotton header. *Id.* The cotton at issue was transported via inland shippers, would be unloaded, and would then be stored at the location. *Id.* at 72. The cotton would then be moved from the warehouse located at the pier onto ships by longshoremen. *Id.* The contract pertaining to the cotton read that "[c]argo moved directly from the ship to shoreside transportation, or directly from shoreside transportation to the ship, is handled solely by longshoremen." *Id.* at 72.

The Supreme Court held that "Ford and Bryant were engaged in maritime employment because they were engaged in intermediate steps of moving cargo between ship and land transportation." *Id.* at 83. The Court held that the "the scope of maritime employment [does not] depend upon the vagrancies of union jurisdiction. (Citation omitted). Instead, the crucial factor is the nature of the activity to which a worker may be assigned." *Id.* at 82 The Court went on to state that a "worker responsible for some portion of that activity is as much an integral part of the process of loading and unloading a ship as a person who participates in the entire process." *Id.* at 82-83.

The Supreme Court further explained the status requirement of the Act in *Chesapeake and Ohio Railway Co. v. Schwalb,* 493 U.S. 40 (1989). This case involved three separate employees who had filed claims under the Act. Schwalb and McGlone were injured at Chesapeake and Ohio Railway's (C&O) terminal where coal was being loaded from railway cars to a ship on navigable waters. *Id.* at 42. C&O's facility employed the use of "a mechanical conveyor-belt system [that] transports coal from railroad hopper cars to colliers berthed at the piers." *Id.* The process was further explained as follows:

> [t]he loading process begins when a hopper car is rolled down an incline to a mechanical dumper which is activated by trunnion rollers

> and which dumps the coal through a hopper onto conveyor belts. The belts carry the coal to a loading tower from which it is poured into the hold of a ship. The trunnion rollers are located at each end of the dumper. Typically, some coal spills out onto the rollers and falls below the conveyor belts during the loading process. The spilled coal must be removed frequently to prevent fouling of the loading equipment.

Id. at 42-43.

Schwalb sustained a head injury while walking on a catwalk on her way to clean the rollers, and McGlone suffered a right arm injury when clearing coal from beneath the conveyor belt. *Id.* at 43. The third claimant, Goode, was employed by Norfolk and Western Railway Company. Goode was injured while repairing a "retarder" which is a device used in the unloading of coal from a railway car to a conveyor belt. *Id.*

The Supreme Court found these employees entitled to coverage because they were "injured while maintaining or repairing equipment essential to the loading or unloading process." *Id* at 47. The Court went on to explain that these employees are essential to the process because "[w]hen machinery breaks down or becomes clogged or fouled because of lack of cleaning, the loading process stops until the difficulty is cured." *Id.* The Court found coverage because the tasks that they were performing were integral to the process of loading vessels.

The Benefits Review Board (hereinafter "Board") has also addressed the issue of status on numerous occasions. In *Garmon v. Aluminum Co. of America*, 28 BRBS 46 (Jan. 18, 1995), the Board dealt with the issue of a bulldozer operator at an aluminum manufacturing plant. Garmon was employed as a bulldozer operator in the employer's storage facility. *Id.* at 47. The storage facility was used to store bauxite, which is used in the manufacture of aluminum. *Id.* The process which the bauxite followed to reach the storage facility was outlined by the Board as including the following: transportation via navigable waters to docks owned by the state; the bauxite was unloaded at the docks by employees of the state; the bauxite was then transported via state-owned conveyor belts to the employer's conveyor belts; the employer's conveyor belts lead to the storage facility; and the bauxite was distributed onto the floor of the storage facility from the conveyor belts. *Id.* at 47.

Garmon's job included "bulldozing the bauxite into piles, thereby regulating the flow of the bauxite through the trapdoors [located on the floor of the storage facility], onto the under-ground conveyor belts and into the plant." *Id.* at 47. Garmon stated that his job duties also included "remov[ing] scrap iron from the conveyor belt leading into the storage building and plac[ing] bauxite which fell off the conveyor belts back on them." *Id.* at 47.

The Board found that the Administrative Law Judge had "properly determined that [Garmon's] bulldozing activities [were] not an integral part of the loading process and thus [could] not confer coverage under Section 2(3)." *Id.* at 48. The Board went on to explain that

"the bauxite deposited onto the floor of employer's storage facility could be stored in that building for up to three months and that claimant would only bulldoze the bauxite when it was needed for production and did not flow freely through the floor openings." *Id.* at 48.

The Board further explained that "claimant's bulldozing activities were directly related to employer's manufacturing process rather than to unloading operations." *Id.* at 48. Claimant would only bulldoze the bauxite when it was needed for employer's manufacturing processes. *Id.* The Board also found that Garmon's testimony that he had "removed debris from the conveyor belt leading into the storage facility and placed bauxite which fell off the conveyor belt back on the belt" should have been considered by the Administrative Law Judge. *Id.* at 49. The Board held that this activity could establish that Garmon was covered by the Act because "ensuring that the conveyor belts leading from the ships to the storage facility continued operating entails part of the 'overall unloading process" outlined by the Supreme Court. *Id.* at 49 *citing Schwalb,* 493 U.S. at 40.

The Board also addressed the issue of an employee's status on other occasions. In *Coyne v. Refined Sugars, Inc.*, 28 BRBS 372 (Nov. 28, 1994), the Board addressed whether an employee at a sugar factory where the raw sugar was delivered via ship to the facility was an employee covered by the Act. Once the raw sugar reached the employer's facility it was unloaded and stored in a warehouse. *Id.* at 373. Once the sugar was refined and packaged, Coyne "would unload the bags of sugar from a conveyor belt and either send the bags to a warehouse for later shipment, or load the bags onto a truck for immediate surface transportation." *Id.* at 373.

The Board went on to hold that if Coyne's argument that he was engaged in the unloading of cargo was accepted, the Board would be required to "hold that raw materials received at a manufacturing plant by ship remain in the chain of off-loading steps until processed and ready for further shipment. This is simply not correct." *Id.* at 374. The Board further held that "[w]here raw materials are unloaded from a ship at a manufacturing plant and are then refined or used in a manufacturing process, loading activities are complete upon the delivery of the good to the plant." *Id.* The Board concluded that "[m]ere involvement in a manufacturing operation in which the raw material arrives by ship or the finished product leaves by ship is insufficient to confer coverage under Section 2(3)." *Id.*

The Board further discussed the issue of an employee's status in *Zube v. Sun Refining & Marketing Co.*, 31 BRBS 50 (May 16, 1997), *aff'd* 159 F.3d 1354 (3rd Cir. 1998)(Table). Zube was a tanker truck driver whose job duties included "transferring petroleum products from a storage tank located at employer's Newark, New Jersey, terminal facility into his tanker-truck and thereafter transporting the product to service stations located in the New Jersey area." *Id.* at 50. Zube would receive his shipment from a storage tank. *Id.* The petroleum products stored in the storage tank arrived to that tank either via a pipeline or via a barge." *Id.*

"These products are then transported overland via tanker-trucks by drivers such as [Zube] to employer's service stations. [Zube] sustained an injury during the course of his employment

with employer." *Id.* at 51. The Board found that Zube "filling his truck with petroleum products is not a step in the loading process, and thus that [Zube] did not spend 'at least some' of his time in maritime activity." *Id.* at 52.

Parties' Arguments

Claimant argues that he meets the status requirement of the Act because he spent at least some of his working day engaged in longshore activities. Claimant bases his assessment of his status on the testimony of Mr. Ross. Mr. Ross concluded that Claimant's activity of pushing coal into the D-Stock hopper qualified as longshore activity, as well as the fact that Claimant's job duties supported the movement of the coal at Robena.

Claimant alleges that he was engaged in maritime employment and as such he should be covered by the Act. Claimant refers this Court to the decision of the Supreme Court that states that "the critical factor is the nature of the activity to which a worker may be assigned." Claimant's Oct. 17, 2001 Brief at 21, *citing P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69 (1970)(emphasis in Claimant's Brief).

Claimant argues that he must have spent at least some of his time engaged in longshoring activities, stating that "some" has been defined as 2 1/2 to 5%. Claimant's Brief at 21 *citing Boudloche v. Howard Trucking Co.,* 632 F.2d 1346 (5th Cir. 1980). Claimant argues further that he spent at least some of his work day engaged in longshoring activities by pushing coal into the D-Stock hopper.

Claimant also refers this Court to the decision of the Supreme Court holding that employees injured while repairing or maintaining equipment that is essential to the process of loading or unloading cargo are covered by the Act. Claimant's Brief at 22, *citing Chesapeake and Ohio Railway Co. v. Schwalb,* 493 U.S. 40 (1989). Claimant cites this case for the proposition that a person who has in the course of his employment cleaned, repaired, or maintained the loading apparatus is "integral" to the loading process and thus covered by the Act. Claimant advances the argument that since he could be assigned to perform the duties that are described in *Schwalb,* he is an employee covered by the Act.

Respondent argues that Claimant is not an employee covered by the Act because Claimant does not meet the status test. Initially, Respondent states that Claimant's job classification of mobile equipment operator is not a job specifically mentioned in the Act's coverage.[10] Additionally, Respondent states that the Act is not to be read to exclude the requirement that the injured worker be involved in the loading or unloading of a vessel.

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[10] This argument lacks merit because it has been consistently held that the job classifications listed in the statute are not meant to be all inclusive. *See Schwalb,* 493 U.S. at 45; *Pfeiffer,* 444 U.S. at 80; *Sea-Land Services,* 953 F.2d at 61.

In support of its position, Respondent argues that Claimant was working within his job classification as a mobile equipment operator when he was injured. In the time period surrounding the injury, Claimant was the only classified bulldozer operator at Robena and the presence of a bulldozer operator at Pond #4 was crucial to the construction of the pond. Respondent states that Claimant's bulldozing activities were his primary job duty beginning in 1997 when the footprint at Pond #4 came to be under construction.

Respondent also argues that Claimant's job duties were not essential to the loading or unloading of any vessels. Respondent focuses on Claimant's job duties and the fact that Claimant does not participate in the loading or unloading of vessels. Respondent alleges that Claimant's overall job duties did not include tasks that were essential to the loading or unloading process. Respondent explains that once the coal is unloaded from the barges, it is then transported to the surge bin via a conveyor belt and from the surge bin, the coal is transferred to the silo. Respondent advances the proposition that once the coal reaches the silo, the unloading process is complete.

Respondent states that Claimant has produced no evidence indicating that Claimant's regular job duties involved unloading. Respondent states further that Claimant merely testified that there were "times" when Claimant "worked on the running lines." *Id.* However, Respondent points out that Claimant admitted that he had not performed this task more than twice between 1990 and 1995 and only once between 1995 and 1999. Respondent advances that Claimant performed maintenance on the unloader "only a few times between 1995 and 1997 and not at all since that time." *Id.* at 16. Respondent believes that after 1997, none of Claimant's regular job duties were essential or integral to unloading coal at Robena.

Respondent states that while Claimant "had once been qualified to perform the job of river tipple operator, he was not trained to operate the plant's new computerized river tipple system introduced in 1998, and hence, was not qualified to perform this job after that time." *Id.* at 16. Respondent alleges that it is indisputable that Claimant's job duties did not include operating the river tipple or maintaining or repairing the river tipple at any point in 1999. Respondent further argues that Claimant's primary job duty was as a bulldozer operator and "to level and grade mine refuse in the construction and maintenance" of Pond #4. *Id.*

Respondent states that the activity most likely to constitute loading by Claimant would be pushing coal in the D-Stock hopper after the coal was delivered by Terex. Respondent argues that this activity is not the equivalent of loading coal into the barges at the river tipple. Additionally, Respondent believes that pushing coal into the D-Stock hopper is not a part of Claimant's job duties and that such activity was "minor and infrequent." *Id.* at 17.

Findings

Claimant argues that he qualifies for coverage because he spent at least some of his work time engaged in longshoring activities. Claimant advances the notion that he was engaged in

longshoring activity when he pushed coal into the D-Stock hopper because that activity is integral to the loading of coal. Respondent, on the other hand, argues that Claimant's job duties were not integral to the process of unloading or loading coal at Robena because of the process used at Robena. Respondent argues that once the coal reaches the silo, the coal is no longer in the process of being unloaded. Respondent further argues that Claimant had no job duties that in any way influenced the coal before it reached the silo. Respondent also argues that Claimant was not involved in the loading of coal because pushing coal into the D-Stock hopper is not the equivalent of loading coal and that even if it were found to be so, Claimant's duties at the D-Stock hopper were only "minor and infrequent."

While I believe that Claimant was engaged in pushing coal into the D-Stock hopper on a consistent basis, I do not believe that this activity entitles Claimant to status as an employee covered by the Act. Claimant's job duties are analogous to those examined by the Board in *Garmon*. Like the claimant in *Garmon,* Claimant pushed coal through the D-Stock hopper only when it was needed or when it was unkept. The pushing of coal through the D-Stock hopper was not integral to the loading process. Like the bauxite at issue in *Garmon,* the coal that Claimant pushed through the D-Stock hopper did not flow freely and was only pushed into the hopper when the Terex trucks did not properly unload the coal. Claimant's duties at the D-Stock hopper, whether it involved the D-Stock coal or the stoker coal, was essential to the processing of coal at Robena, but not the loading of coal.

Claimant's situation is also not the same as the situation presented in *Nelson*. In *Nelson,* the claimant was directly involved in the unloading process. Nelson was responsible for ensuring that the sand was properly unloaded by using his bulldozer to position the pipeline. As the Third Circuit stated, Nelson was "directly and intimately involved in unloading the hopper vessel." *Nelson,* 143 F.3d at 799. The same cannot be said of Claimant's activities at Robena. Claimant was not directly, or indirectly, involved in the unloading of any cargo.

Claimant also argues that he is entitled to coverage because of the work that he may have been assigned in the process of his job duties. In support of this position, Claimant cites to the Supreme Court's decision in *Pfeiffer*. Claimant states that he could have been assigned to the duties like those presented in the *Schwalb* decision.

Claimant's reliance on the holding in *Pfeiffer* is misplaced. The language of *Pfeiffer* upon which Claimant relies was directed to the use of the union contract in determining whether an employee qualified for coverage under the Act. The Supreme Court went on to explain that "the scope of maritime employment [does not] depend upon the vagrancies of union jurisdiction. [Citation omitted]. Instead, the crucial factor is the nature of the activity to which a worker may be assigned." *P.C. Pfeiffer,* 444 U.S. at 82. When the statement concerning the duties that an employee may be assigned is placed in context with the preceding sentence, it is clear that the Supreme Court was making clear that the job duties defined by a union contract are not determinative, but the job duties actually assigned to the employee are dispositive. Therefore, Claimant's reliance on this statement by the Supreme Court is misplaced.

Claimant advances the argument that he is entitled to coverage under the Act because coverage has been approved when the employee was injured while repairing or maintaining equipment that is essential to the loading or unloading process. Claimant argues that any employee who has in the course of his employment repaired or maintained necessary loading or unloading equipment, is integral to the loading or unloading process. Respondent alleges that Claimant worked on the running lines only two times between 1995 and 1999 and only once between 1995 and 1999. Additionally, Respondent states that Claimant conducted maintenance on the unloader only a few times between 1995 and 1997 and not at all after 1997.

Again, I believe that Claimant's reliance on the existing law is misplaced. In *Schwalb*, the Supreme Court dealt with employees who were injured while engaged in repairing or maintaining equipment that was essential to the loading or unloading process. *Schwalb*, 493 U.S. at 47. What is clear from the Supreme Court's holding, is that the employees found to be covered were either engaged in or on their way to conduct repairs or maintenance on equipment when the injury occurred. Nowhere did the Supreme Court expand this coverage to an employee who at some point in his employment had repaired equipment or to an employee who some day in the future may engage in repairing or maintaining equipment, and was injured when engaged in an activity that in no way related to the repair or maintenance.

Claimant argues that because he could have been assigned to repair the unloading equipment, he is entitled to coverage under the Act. This stretches the holdings in *Schwalb* and *Pfeiffer* beyond what the Supreme Court actually held in these cases. While it is clear that Claimant had at some remote point in his employment repaired unloading and loading equipment, Claimant's lack of status as a longshoreman is indicated by the fact that Claimant had done neither in the recent past nor was Claimant involved in any such repairs at the time of his injury.

Claimant also advances the argument that because he had at one point in his employment assisted in clearing a coal spillage from a conveyor belt, that he is entitled to coverage under the Act. Coverage has been found where an employee cleans coal spillages where the "spilled coal must be removed frequently to prevent fouling of the loading equipment." *Schwalb*, 493 U.S. at 42-43. The Supreme Court makes clear in *Schwalb* that the cleaning of the coal to prevent fouling was done on a consistent and frequent basis. By Claimant's own admission, he was only required to clean up a coal spill on one occasion when the spillage was so severe that the plant could not be operated until the spillage was cleared. This singular event, at some point in the past, does not entitle Claimant to coverage.

Claimant argues that he was engaged in maritime employment when he operated the river tipple. Claimant testified that he had not been certified to operate the tipple since 1997. While this fact alone is not dispositive, Claimant also admitted that he had operated the river tipple six to eight times between 1997 and 1999 only at the request of the river tipple operator or at his own urging. (TR 196). Therefore, this cannot be considered one of Claimant's regular job duties because the task was not assigned, encouraged, nor condoned by Respondent.

Claimant has failed to establish any job duties which entitle him to status as a maritime employee. Therefore, Claimant has failed to establish the first prong of the jurisdictional analysis.

SITUS

Applicable Law

> [C]ompensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel).

33 U.S.C. § 903(a).

The Third Circuit has elaborated on the situs requirements in *Nelson.* In *Nelson,* the Third Circuit found that the site of the beach reclamation project was a covered situs because that beach had been used by Nelson's employer to unload a vessel. *Nelson,* 143 F.3d at 797. The Court went on to explain that because the hopper vessel was unloaded onto the beach, that the beach would constitute an adjoining area that was customarily used by Nelson's employer to unload the hopper dredge. *Id.* The Third Circuit held that the use of the term "area" in §903(a) "does not denote a building or structure as such, but rather an open space, indeed sometimes within a building or other structure." *Id.*

Parties' Arguments

Claimant argues that for an area to qualify as an adjoining area there "must be a 'nexus' or connection between the area and an activity on navigable waters." *See* Claimant's Oct. 17, 2001 Brief at 11. Claimant believes that Pond #4 has a connection to maritime activity because it supports the "mission" of Robena which is "loading/unloading coal for shipment to customers." *Id.* Claimant bases this belief on the fact that the Robena facility borders the Monogahela River and that the area is not accessible to the public at large. Claimant argues that Pond #4 is essential to the acts of loading and unloading coal because the pond is necessary for the disposal of the processing waste.

Respondent argues that Claimant does not meet the situs requirement of Section 3(a) because Claimant was not injured while working at a covered situs. *See* Respondent's Oct. 17, 2001 Brief at 5. Respondent states that since Claimant was injured while operating a bulldozer at Pond #4, Claimant is not entitled to coverage under the Act. Respondent argues that Pond #4 is not a covered situs.

Respondent alleges that Pond #4 is not a covered situs because it is not a navigable water of the United States. It was clear from the testimony offered at the hearing and the supporting documentation, that Pond #4 is not to be considered navigable water of the United States. As such, Respondent is correct in this assertion. Additionally, Respondent alleges that Pond #4 has no piers, bulkheads, or other facilities where loading, unloading, or "any activity incidental to marine commerce or shipbuilding" can occur. *See* Respondent's Oct. 17, 2001 Brief at 7.

Respondent further alleges that Pond #4 is not a dry dock, terminal, building way, or marine railway, nor is it an "other adjoining area customarily used by [Respondent] in loading, unloading, repairing, dismantling, or building a vessel." *Id. citing* 33 U.S.C. § 903(a). Respondent advances the argument that the dispositive question regarding situs is whether the employer customarily uses the area where the injury occurred for loading or unloading. *Id. citing Nelson v. American Dredging Co.*, 143 F.3d 789 (3rd Cir. 1998). Respondent argues that the slate used to construct Pond #4 was transported to that location by land vehicles and that the waste products that are disposed of at Pond #4 are pumped to the pond via plastic pipelines from the plant.

Findings

The only way for Claimant to have been injured on a maritime situs is if Pond #4 is considered an "adjoining area customarily used by [Respondent] in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S. C. §903(a). Pond #4 is used for the disposal of processing waste, therefore, the pond is essential to Respondent's manufacturing operation. However, this does not make the pond essential to the loading or unloading of the coal.

It cannot be said that Pond #4 is an area that is customarily used by Respondent for the loading or unloading of coal. The pond is used for the disposal of processing waste, not loading or unloading cargo. Therefore, I find that Claimant was not injured on a marine situs as defined by Section 903(a).

ORDER

IT IS HEREBY ORDERED that the claim of James R. Maraney for benefits under the Longshore and Harbor Workers' Compensation Act is dismissed for lack of jurisdiction.

A
ROBERT J. LESNICK
Administrative Law Judge